

MORGAN, LEWIS & BOCKIUS LLP

101 Park Avenue
New York, New York 10178-0600
Telephone: (212) 309-6000
Facsimile: (212) 309-6001
Neil E. Herman, Esq.

- and -

One Federal Street - 32nd Fl
Boston, MA 02110-1726
Telephone: (617) 341-7716
Facsimile: (617) 341-7701
Laura McCarthy, Esq.

Hearing Date: February 4, 2019 at 10:00 a.m.
Objection Deadline: January 26, 2019 at 4:00 p.m.

Counsel to Kimco Realty Corporation

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X	
In re	:
	:
	: Chapter 11
SEARS HOLDINGS CORPORATION, et al.,	:
	:
	: Case No. 18-23538 (RDD)
	:
Debtors. ¹	: (Jointly Administered)
-----X	

**OBJECTION AND JOINDER OF LANDLORD TO THE DEBTORS' NOTICE OF
CURE COSTS AND POTENTIAL ASSUMPTION AND ASSIGNMENT OF
EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

Kimco Realty Corporation and certain of its affiliates (collectively, "Kimco"), by its attorneys, Morgan, Lewis & Bockius, LLP, in response to Debtors' *Notice of Successful Bidder and Sale Hearing* filed on January 18, 2019 (the "Sale Motion") [Dkt. No. 1730], Debtors'

¹The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); Sears, Roebuck de Puerto Rico, Inc. (3626); SYW Relay LLC (1870); Wally Labs LLC (None); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Sears Brands Business Unit Corporation (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); and Sears Brands Management Corporation (5365). The location of the Debtors' corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.
DB1/101774654.2

Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases filed on January 18, 2019 (the “Initial Cure Notice”) [Dkt. No. 1731], and Debtors’ Supplemental Notice of Cure Costs [Dkt. No. 1774] (together with the Initial Cure Notice, the “Cure Notices”) respectfully state as follows:

1. Kimco is landlord to the Debtors pursuant to certain leases for non-residential real property (the “Kimco Leases”).²

2. Kimco objects to the proposed cure amounts as set forth in the Cure Notices for the following lease locations³:

<u>STORE NUMBER</u>	<u>DEBTORS’ ASSERTED CURE CLAIM</u>	<u>CORRECT CURE AMOUNT</u>
1149	\$ 5,306.00	\$136,369.88
1998	\$129,837.50	\$134,337.94
3818	\$10,983.00	\$29,265.86
3978	\$15,134.80	\$19,115.17
9224	\$0.00	\$27,790.75
9614	\$64,040.00	\$103,033.37

3. Section 365 of the Bankruptcy Code governs the assumption and assignment of executory contracts and unexpired leases. In general, in order to assume an unexpired lease, a debtor in possession must cure the arrearages and provide adequate assurance of future performance under such lease. See 11 U.S.C. § 365(b)(1). Section 365 mandates that any purported assumption or assignment of the Leases is “subject to the Court’s approval.” 11 U.S.C. §§ 365(a), (f)(2). “The Bankruptcy Code imposes heightened restrictions on the assumption and assignment of leases for shopping centers.” *In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086 (3rd Cir. 1990) (citing 11 U.S.C. 365(b)(3)). Shopping center landlords like Kimco are afforded special statutory protections in the form of adequate assurance. *Id.*

² The Kimco Leases and related documentation are voluminous, and therefore, have not been attached to this Joinder. Kimco will provide copies of the Kimco Leases and related documentation to this Court and parties in interest upon request.

³ A summary of applicable charges and the accurate cure amounts are attached hereto as Exhibit A.

4. As set forth above, the Debtors have failed to sufficiently cure the arrearages for the subject leases. Consequently, the Sale Motion and Cure Notices must be denied as it relates to the cure amounts with respect to the subject leases.

5. To the extent not inconsistent with the arguments made herein, Kimco hereby joins in all other objections raised by any other landlords to the Cure Notices and the Sale Motion and incorporates all of the arguments raised by the other objecting landlords as if set forth in detail herein.

6. Kimco reserves the right to supplement this Objection and Joinder and make such other and further objections as may be necessary or appropriate.

WHEREFORE, Kimco respectfully requests that this Court enter an order (i) denying without prejudice the proposed assumption and assignment of the subject leases, and (ii) granting such further and other relief as this Court may deem just and proper.

Dated: New York, New York
January 25, 2019

MORGAN, LEWIS & BOCKIUS LLP
Attorneys for Kimco Realty Corporation

By: /s/ Neil E. Herman
Neil E. Herman (NH-2513)

101 Park Avenue
New York, New York 10178
Tel: 212-309-6000
Fax: 212-309-6001
E-mail: neil.herman@morganlewis.com

- and -

Laura McCarthy, Esq.
Morgan, Lewis & Bockius LLP
One Federal Street - 32nd Fl
Boston, MA 02110-1726
Direct Phone: (617) 341-7716
Fax: (617) 341-7701
Email: laura.mccarthy@morganlewis.com